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No. 84-777

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARLINGTON COUNTY and MICHAEL KYLE,
Petitioners,

v.

ALVIN B. BISCOE, JR., and ELEANOR L. BISCOE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

A pedestrian lost both legs as a result of an automobile accident in the District of Columbia that occurred in the course of the pursuit of a robbery suspect by an Arlington County, Virginia, police officer. In an action for damages against Arlington County and the officer, federal courts in the District of Columbia applied the District's own tort liability rules and held Arlington County liable even though the county would have been immune if Virginia law had been applied, and held the officer liable for a want of due care. The questions presented are:

1. Whether the full faith and credit clause or some other constitutional principle required the courts to bar recovery from Arlington County on the ground of the immunity from liability conferred on a Virginia county by Virginia law.

2. Whether the privileges and immunities clause of Art. IV, § 2 or equal protection principles were violated by the standard applied in determining whether the conduct of the Arlington County officer was negligent and whether that question was raised below and preserved for review by this Court.

TABLE OF CONTENTS

	Page
STATEMENT	1
ARGUMENT	3
CONCLUSION	12

TABLE OF AUTHORITIES

CASES:

Allstate Ins. Co. v. *Hague,* 449 U.S. 302 (1981)	8,9
Lake Country Estates, Inc. v. *Tahoe Regional Planning Agency,* 440 U.S. 391 (1979)	5
Lincoln County v. *Luning,* 133 U.S. 529 (1890)	6
Messina v. *Burden,* No. 81-1485, Slip Op. (Va. Oct. 12, 1984)	4
Monnell v. *New York City Dep't of Social Services,* 436 U.S. 658 (1978)	5
Nevada v. *Hall,* 440 U.S. 410 (1979)	*passim*
Wade v. *District of Columbia,* 310 A.2d 857 (D.C. 1973) (en banc)	6

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. Const., Art. III	5,9
U.S. Const., Art. IV, § 1	*passim*
U.S. Const., Art. IV, § 2	4,11
U.S. Const., Amend. V	4,11
U.S. Const., Amend. XI	5,9
28 U.S.C. § 1332(a)	2
D.C. Code Ann. § 1-1211(4)	10
D.C. Code Ann. § 1-1211(6)	10
D.C. Code Ann. § 1-1212	10
D.C. Code Ann. § 23-901 ("Fresh Pursuit Act")	9

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STATEMENT

On September 29, 1979, a savings and loan in Arlington County, Virginia, was robbed. Michael Kyle, an Arlington County police officer, responded to a broadcast alarm by following a car driven by a suspect in the robbery across the Theodore Roosevelt Bridge into the District of Columbia. Officer Kyle, alone in his police car, turned on his emergency lights and siren and caused the suspect car to stop on the E Street ramp off the Roosevelt Bridge. Officer Kyle parked his car behind. The suspect driver, Lyntellus Brooks, got out of his car with his hands in the air. Kyle directed him to stand with his hands on

the trunk of his car, but the officer took no other precautions as he then went to the passenger side of the car to investigate the other occupants, a man and two women. Brooks, who had left the driver's door ajar and the car engine running, jumped back into the car and drove off down the E Street Expressway. (Pet. App. 2a-4a.)

Officer Kyle returned to his car and, with lights flashing and siren sounding, chased Brooks along the expressway and through the E Street tunnel at high speed. Shots were fired at the officer. In the intersection of E and 19th Streets Brooks hit another car, and his car careened off into the southeast corner of the intersection. There it pinned a pedestrian, the respondent Dr. Alvin Biscoe, against a light pole, severing one of his legs above the knee and so mangling the other that it later had to be amputated, also above the knee. Brooks fled on foot, was restrained by pedestrians and was ultimately taken into custody, after the frustrated Officer Kyle hit him on the side of the head with the butt of the officer's shotgun. (Pet. App. 4a-5a.)

Dr. Biscoe and his wife, the respondent Eleanor Biscoe, sued in the District Court for the District of Columbia, founding jurisdiction on diversity of citizenship, 28 U.S.C. § 1332(a). Officer Kyle, Arlington County, and Brooks were among the defendants. The jury returned a verdict finding that Officer Kyle was negligent in the way he handled the stop of Brooks and his car on the bridge ramp and in his high-speed chase of Brooks's car along E Street, and that Arlington County was responsible for his negligence on conventional respondeat superior grounds. The jury found Arlington County itself negligent, without regard to respondeat superior, in its training and supervision of Officer Kyle. Brooks was also found negligent. The jury found the necessary causal relationship between the defendants' negligence and the plaintiffs' injury. On this basis, the jury awarded $4

million to Dr. Biscoe for the loss of his two legs and $1 million to his wife. The latter award was reduced on remittitur to $350,000. (Pet. App. 5a-7a.)

Officer Kyle and Arlington County appealed. The court of appeals affirmed the judgment entered on the jury's verdict (subject to the remittitur). (Pet. App. 29a.) It held that this Court's decision in *Nevada* v. *Hall,* 440 U.S. 410 (1979), foreclosed Arlington County's claim that it was entitled, in litigation in a District of Columbia court over an automobile accident that occurred in the District of Columbia, to the immunity from liability conferred on it by Virginia law. (Pet. App. 8a-12a.) The court also held that the standard to be applied in determining liability was "due care" and that in any event the defendants, by not objecting to the trial court's standard-of-care instruction (*see* Pet. App. 31a n.2), waived any claim that the proper standard was gross negligence. (Pet. App. 23a-26a.)

ARGUMENT

The decision below presents no issue worthy of review by this Court. Only one question presented here is actually presented on the record and was both raised and preserved below. That is the question whether the full faith and credit clause of Article IV, Section 1 (or some other unspecified doctrine explicit or implicit in the Constitution), requires a court in the District of Columbia to allow Arlington County to avoid liability for its negligent part in causing a traffic accident within the borders of the District because Virginia counties are immune from tort liability in Virginia courts. That question, which for reasons of advocacy petitioners state two different ways as their questions 1 and 2, is squarely answered against them by this Court's decision in *Nevada* v. *Hall,* 440 U.S. 410 (1979). Judge Edwards's careful opinion for the court of

appeals below refutes petitioners' attempted distinctions of that decision.[1]

The other question that petitioners purport to present is whether it violates the privileges and immunities clause of Article IV, Section 2, or is a denial of equal protection to assess Officer Kyle's liability according to a standard different from that which would have been employed in assessing the liability of a District of Columbia police officer. Petitioners, who made no such argument below, do not specify the nature or source of the different standards. They did argue in the court of appeals that, because the District is liable only for the gross negligence of one of its policemen driving a District police car on an emergency run, the jury should have been instructed that *Arlington County* was liable only for gross negligence. The court below held correctly that petitioners had waived even that contention by not objecting to the trial court's standard-of-care instruction. Petitioners certainly have never raised any constitutional question pertaining to the standard of care as it relates to Officer Kyle. In any event, there is no substantial constitutional question.

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[1] The full faith and credit clause question seems not to affect Officer Kyle's liability. Virginia counties, not Virginia county employees, enjoy full sovereign immunity in Virginia courts. County employees have a measure of immunity but apparently are liable for their non-discretionary torts in Virginia as District employees are in the District of Columbia. *See* Messina v. Burden, No. 81-1485, slip op. at 13 (Va. Oct. 12, 1984) (quoted at Pet. 4 n.1). Officer Kyle's argument below was that his acts were discretionary so that he was not liable under *District* law. (Pet. App. 19a-22a.) The petition includes a querulous footnote (Pet. 6 n.2), but it presents no question concerning the court of appeals' ruling that, under District of Columbia law, Officer Kyle's acts were ministerial and operational and not discretionary (Pet. App. 19a-22a). This Court's answer to any such question would be, if anything, less authoritative than that of the court below. If the court below wrongly discerned the line that the District of Columbia Court of Appeals has drawn to separate the discretionary from the non-discretionary, only that court can say so with authority.

1. In *Nevada* v. *Hall,* 440 U.S. 410 (1979), an employee of the University of Nevada driving a university automobile on official business was involved in a collision in California; he was killed and two California residents, occupants of the other car, were injured. They sued in a California state court, naming the State of Nevada as a defendant. Nevada claimed immunity from suit in California courts. Nevada argued further that the full faith and credit clause required California to give effect to the Nevada law that limited the State's waiver of immunity to suits in Nevada courts and in any event limited its liability for torts of its employees to $25,000. The California courts rejected these claims and, after judgment was given for the plaintiffs against Nevada and affirmed, this Court also rejected them. The Court could not find in Article III or the Eleventh Amendment any implication that one state's courts must respect the sovereign immunity of another state. 440 U.S. at 414-21. So far as the full faith and credit clause is concerned, the Court said, as quoted by petitioners, that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." 440 U.S. at 422 (Pet. 7).

The court below, in considering petitioners' arguments that this case—so similar in so many ways on the face of things—is different from *Nevada* v. *Hall,* properly focused on what this Court had to say about the full faith and credit clause. Whatever the implications of Article III and the Eleventh Amendment for the sovereign immunity of the states, they do not reach a mere county. On the same day that *Nevada* v. *Hall* was decided, the Court in another case spoke matter-of-factly, in a subordinate clause, of "a county or municipality, which has no Eleventh Amendment immunity . . . ." *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U.S. 391, 401 (1979). See also *Monnell* v. *New York State Dep't of*

Social Services, 436 U.S. 658, 690 n.54 (1978); *Lincoln County* v. *Luning,* 133 U.S. 529, 530 (1890).

The court of appeals found that the "legitimate public policy" of the District of Columbia was to recognize the liability of the District for non-discretionary tortious conduct of its employees. That policy of compensating victims of non-discretionary official torts from public funds was confirmed by the District of Columbia Court of Appeals in *Wade* v. *District of Columbia,* 310 A.2d 857 (D.C. 1973) (en banc). The court there held that assault and battery and false arrest were not discretionary torts and the District of Columbia was liable for such acts on the part of one of its police officers if the plaintiffs in that case could prove them.

The court below ruled, consonantly with *Wade,* that both Arlington County's own negligence in training and supervising Officer Kyle and Officer Kyle's negligence imputed to it were non-discretionary (note 1, *supra*). (Pet. App. 10a, 19a-22a.) It followed that "[f]orced application of Virginia's law would . . . frustrate the policies that underlie the District's immunity rules; under *Nevada* v. *Hall,* the District is not required to honor Virginia's claim of sovereign immunity under such circumstances." (Pet. App. 10a.)

2. That is probably all that need be said on petitioners' questions 1 and 2. The decision below is an unremarkable, unexceptionable application of *Nevada* v. *Hall.* But petitioners stake their all on a footnote to the opinion in *Nevada* v. *Hall,* in which the Court said that California's exercise of jurisdiction "poses no substantial threat to our constitutional system of cooperative federalism," that "[s]uits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities," and that the Court had no occasion to consider

"whether different state policies, either of California or of Nevada, might require a different analysis or a different result." 440 U.S. at 424 n.24.

What we have here seems to be the comparable case of a "traffic accident[ ] occurring outside of" Arlington County—one of the very "traffic-accident torts" to which the dissenting Justices thought the holding of *Nevada* v. *Hall* was confined by footnote 24. 440 U.S. at 429. Petitioners nevertheless urge that this is a case reserved by footnote 24 that requires a different analysis and a different result. They say that imposing liability on Arlington County does pose a "substantial threat to our constitutional system of cooperative federalism" and threatens to interfere with Arlington County's "capacity to fulfill its own sovereign responsibilities." This is so, petitioners assert, because (1) the missions of county police forces in neighboring jurisdictions are different from, and more important than, the missions of state universities in neighboring states; (2) Officer Kyle was trained in Arlington and supervised from there so that not all the relevant events occurred in the District; (3) Arlington County was subject to liability for ordinary negligence whereas the District of Columbia would have been liable, in the same circumstances, only for gross negligence; and (4) there is an interest in fresh pursuit of suspects across jurisdictional lines, recognized by a statute enacted for the District by Congress, and a broader federal interest in cooperative law enforcement. (Pet. 10-14.)

There is nothing to any of these asserted reasons for distinguishing *Nevada* v. *Hall*. Petitioners lay their greatest stress on the first. Their rhetoric about how the decision below may affect police conduct (Pet. 4-7) is overblown. The court below showed that in the circumstances of the case any concern that its decision would "deter police officers from proper performance of their duties" was "weak, if existent." (Pet. App. 16a-17a.)

In any event, Arlington County, or Virginia on its behalf, can claim no special strength for a policy of protecting the county against liability for the line-of-duty negligence of its police officers. Virginia's policy of immunity of its counties from liability is uniform for all county activities. It is not limited to police chases, and the torts of policemen enjoy no special status under the Virginia law of county immunity. The policy of immunity extends also, and with the same force, to the county truck driver who negligently collides with another vehicle while carrying seedlings to plant in a county park or to the county official who hits a pedestrian while driving a county car to a Rotary Club luncheon to explain county policy. So broad a policy must logically rest in large part, at least, on Virginia's "concern for the financial integrity of its counties," which, as the court below pointed out, could be satisfied through the purchase of liability insurance to cover the unusual case of extra-state torts for which Arlington County would not be immune. (Pet. App. 16a.)

Furthermore, the relative weight of Virginia and District of Columbia policies or interests is of no moment in determining whether the full faith and credit clause requires the application of Virginia law by a District of Columbia court. Seven of the eight Justices who participated in *Allstate Ins. Co.* v. *Hague,* 449 U.S. 302 (1981), agreed that "the Court has . . . abandoned the weighing-of-interests requirement" under the full faith and credit clause, *id.* at 308 n.10 (plurality opinion), so that "[t]he Court should invalidate a forum State's decision to apply its own law only when there are no significant contacts between the State and the litigation," *id.* at 332 (dissenting opinion).

Surely no one would doubt that the District of Columbia has contacts that are at least significant with a traffic accident that takes place in the District and causes

serious injury to one sojourning in the District, as Dr. Biscoe was. After *Allstate* if not before, it is immaterial to full faith and credit analysis how extensive are Virginia's rival contacts with the transaction, making irrelevant not only the strength of Virginia's interest in county immunity for policemen's torts but also the locale of the training and supervision of Officer Kyle. When all that matters is that the District's contacts are "significant," it is immaterial what standard the District of Columbia applies to the transaction, due care or gross negligence, or that the standard may differ from that applied in other cases. And it is immaterial by what authority or in furtherance of what interest Officer Kyle was pursuing Brooks in the District; nothing in the Fresh Pursuit Act (Pet. 2) suggests that the District cannot impose liability on a jurisdiction that sends into the District in fresh pursuit a policeman who behaves as carelessly as Officer Kyle did in attempting to detain Brooks and his passengers and then renewing the pursuit of them along crowded city streets.

Finally, it is true that three Justices dissented in *Nevada* v. *Hall,* 410 U.S. at 427, 432, and the footnote of which petitioners make so much may have been the response to their concern over the breadth of the opinion. (Pet. App. 10a-11a.) But those three Justices, who were later to join either the plurality opinion or the dissenting opinion in *Allstate,* did not try to satisfy their concern for what they regarded as an intrusion into Nevada's sovereignty from the full faith and credit clause. They thought that Nevada's sovereign immunity had its roots elsewhere in the Constitution—the Eleventh Amendment and Article III—and must be recognized by California because of demands implicit in those provisions, not because of the demand of full faith and credit. It bears repeating that Arlington County does not share in whatever immunity Virginia might derive from those other constitutional sources. If Arlington County is not aided by full faith and

credit—as it is not—it has no other conceivable constitutional claim to recognition of its immunity.

3. Provisions of the District of Columbia Code codify and define a specific branch of the District's liability for the torts of its employees, automobile accident torts. In most cases the District is liable for harm caused by negligent operation of a vehicle. For claims "arising out of the operation of an emergency vehicle on an emergency run," the District is liable only for gross negligence. D.C. Code Ann. § 1-1212. An "emergency run" is defined to refer to the movement of a District-owned vehicle, and only employees of the District are encompassed by the statute. *Id.* § 1-1211(4), (6). The court below ruled that, as is obvious on the face of the statute, it does not establish the standard for determining Arlington County's liability for the conduct of its officer in pursuing bank robbers in an Arlington County vehicle. (Pet. App. 24a.) The court ruled that the standard applicable to that conduct was "due care, as limited by the guidelines applicable to Officer Kyle's conduct." (Pet. App. 23a.) Those guidelines include a policy of not engaging in high speed chases—chases at more than 20 miles an hour above the speed limit—in the District of Columbia. (Pet. App. 5a & n.1.) There was evidence from which the jury could have found that Officer Kyle averaged over 55 miles an hour and drove as fast as 80 miles an hour in his second chase of Brooks eastward along E Street, where the speed limit is 30 miles an hour through the tunnel and then 25. (Pet. App. 4a.)

Petitioners argued in the court of appeals that *Arlington County's* liability should have been measured according to the gross negligence standard that petitioners said would have been applicable to the District of Columbia in comparable circumstances. The court rejected that argument on the merits, as indicated above, because the statute is limited to the case of District employees driving District

cars. (Pet. App. 23a-25a.) The court also stated that the statutory gross negligence standard "does not protect employees, as opposed to the municipality, and surely does not cover Officer Kyle" (Pet. App. 24a), and ruled that petitioners failed to challenge the district court's instructions to the jury on standard of care and had thereby waived the claim that the gross negligence standard should have applied even to Arlington County (Pet. App. 25a-26a).

It is not clear whether, in urging that the privileges and immunities clause and equal protection prevent the application to Officer Kyle of a standard of care different from that applicable to a District of Columbia officer, petitioners mean to invoke the inapposite gross negligence statute. They do not specify how or for what reason Officer Kyle was treated differently from the putative District officer. (Pet. 17-18.) The statute limiting the District's own liability to cases of gross negligence is the nearest thing we have found. But that statute clearly has nothing to do with the standard governing the liability of individual employees; any claim based on it even as to Arlington County was waived by failure to preserve it in the district court; no constitutional claim relating to it or any other standard-of-care issue was raised in either of the courts below; and, finally, there is no constitutional barrier to the District's limiting its own liability in a way that the liability of no other employer, resident or non-resident, is limited.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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